

362 (d)

Failure to pay taxes = cause

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Waycross Division

In the matter of:

DARRELL C. BOATRIGHT
CAROLYN SUE J. BOATRIGHT

Debtors

FEDERAL LAND BANK OF COLUMBIA

Movant

v.

DARRELL C. BOATRIGHT
CAROLYN SUE J. BOATRIGHT

Respondents

Chapter 11 Case

Number 587-00217

FILED

at 12 O'clock & 51 min. PM

Date 5/2/88

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

ORDER ON MOTION FOR RELIEF FROM STAY
AND FOR ADEQUATE PROTECTION

Debtors' Chapter 11 case was filed on November 24, 1987. On January 7, 1988, a Motion for Relief from Stay and for Adequate Protection was filed by the Federal Land Bank of Columbia ("Land Bank") and a hearing on said Motion was conducted in Waycross, Georgia, on February 16, 1988. The parties were granted time to file briefs in support of their respective

positions which were received on March 1, 1988, and March 14, 1988. After consideration of the evidence, the authorities cited by the respective parties, and other applicable authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) Debtors' executed a promissory note in the principal amount of \$450,000.00 in favor of the Federal Land Bank of Columbia on November 1, 1977. (Exhibit P-1A).

2) Said indebtedness was secured by a deed to secure debt dated August 29, 1977 executed by Debtors in favor of the Federal Land Bank of Columbia and conveying title to five tracts of land in Bacon County, Georgia. (Exhibit P-2).

3) The total of principal and interest through February 10, 1988, owed to the Federal Land Bank is \$436,346.35 (Exhibit P-1C). Moreover, on September 9, 1987, a notice of intent to enforce the provisions in said note and debt deed was given by the Land Bank to the Debtors in accordance with Georgia law. (Exhibits P-3 and P-4).

4) The Debtors failed to pay any of said indebtedness within the ten day grace period provided under Georgia law and Movant claims entitlement to an additional 10% of principal and all accrued interest as attorney's fees under the terms of the note and deed to secure debt for a total indebtedness of \$478,346.35.

5) The parties have stipulated that the value of the tracts of land is \$450,000.00.

6) Debtors' plan of arrangement under Chapter 11 was filed with this Court at the hearing held on February 16, 1988. (Exhibit D-4). The Debtor projects approximately \$95,000.00 from the sale of soybeans which he intends to grow on 343 acres of land together with approximately \$19,000.00 from government farm programs and \$7,000.00 from leasing of a tobacco allotment for gross annual farm income of \$121,000.00. His total expenses to produce the soybean crop total only \$38,000.00 which would yield approximately \$84,000.00 with which to fund his payments to secured creditors in this case, pay family living expenses of approximately \$12,000.00 per year and yield an annual cash balance of slightly over \$2,000.00.

7) The Movant contested the validity of the

Debtors' projections based on the fact that the Debtors' cash outlays for production of their soybean crop fail to take into account non-cash items such as depreciation and because said projections were unrealistically low in estimating the actual cost of certain items that would be necessary to produce such a crop. In balancing the factual testimony on this subject, while I conclude that the Debtors' projections are quite optimistic, I am unable to conclude that they are so unrealistic as to be disregarded in my decision in this matter.

CONCLUSIONS OF LAW

11 U.S.C. Section 362(d) provides that relief from the stay established under Section 362(a) should be granted

- "(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
- (2) with respect to a stay of an act against property under subsection (a) of this section, if
 - (A) the debtor does not have an equity in such property; and
 - (B) such property is not necessary to an effective reorganization."

In determining whether relief from stay should be granted under Section 362(d)(2), the stipulations of the parties establish that the Debtors do not have any equity in the subject real estate. The additional indebtedness represented by attorney's fees accrued pre-petition and for the purposes of this analysis is included in the indebtedness which must be measured against the value of the property in determining whether there is equity. See discussion, In re Rice, 82 B.R. 623 (Bankr. S.D.Ga. 1987). The total indebtedness exceeds the stipulated value of the land which is \$450,000.00 and the Movant has carried its burden of proof on this subject. Pursuant to 11 U.S.C. Section 362(g), however, Debtors have the burden of proving all other issues. As applied to the facts in this case Debtors must carry the burden of proving that this property is necessary to an effective reorganization.

From the evidence before me Debtors have no source of income other than the monies they can receive by the production of crops or the receipt of payment under various government programs as a result of their ownership and use of the real estate in question. Thus the retention of this real estate is without question necessary to the Debtors' reorganization. The more difficult question is whether retention of this real estate is necessary to an effective reorganization; that is

whether the Debtors have a realistic possibility of reorganizing within a reasonable time. United Savings Association of Texas v. Timbers of Inwood Forest Association, Inc., ___ U.S. ___, 108 S.Ct. 626 at 632 (1988).

In uniformity with my finding of fact number 7 while the Debtors' projections tend to be on the optimistic side, and despite the fact that one of the underlying assumptions behind the projections is that members of the Debtors' family will contribute, at no cost to the Debtors, both labor and the use of equipment in order for them to harvest their crop as inexpensively as he projects, there was no contrary evidence tending to show that the Debtors were not in a position to in fact obtain said labor and use of equipment without paying for it. In the absence of such contrary evidence I am compelled to conclude that the Debtors have carried their burden of proof on this subject and that the Debtors have prospects of achieving an effective reorganization.

The remaining inquiry to be made is whether relief from stay should be granted for cause including lack of adequate protection pursuant to Section 362(d)(1). No evidence was introduced to establish any other cause for granting said relief other than the Debtors' failure to make contractual

payments or pay current interest payments under the note on which he is obligated. Prior to entry by the United States Supreme Court of the opinion in Timbers, supra., I would have been compelled to conclude that the Motion should either be granted or the Debtors would be required to make, as a minimum, the current interest charges accruing on the mortgage indebtedness. See American Mariner, 734 F.2d 426 (9th Cir., 1984); In re Rice, supra.

Since the holding in Timbers, however, I am compelled to read Section 361 differently. As applied to the facts in this case, there has been no showing that the stay of Section 362 "results in a decrease in the value of such entity's interest in such property"; there was no evidence indicating that the value of the real estate is diminishing in value. However, to the extent that the Debtors fail to pay the current tax obligations which accrue on said real estate, the value of the Movant's interest in said property will be diminished dollar for dollar.

Accordingly, pursuant to 11 U.S.C. Section 361(3), the Debtors are required, not later than the due date for said payment or within thirty (30) days from the date of this order, whichever event is later, to pay all state and local ad

valorem taxes which may accrue and be billed by the appropriate taxing authority with respect to the real estate in question.

Debtor has also offered to pay an amount equal to the reasonable rental value of the land as a means of adequate protection pending confirmation of this case. As a result, Debtor is further required within thirty (30) days from the date of this order to pay the reasonable rental value for an annual lease of the subject property in the amount of \$9,000.00.

An additional issue was raised at the hearing and in the parties' briefs as to whether the Movant is entitled to receipt of some or all of the proceeds received by the Debtors for rental of this land during the crop year 1987. While the Debtors acknowledged receipt of certain sums of money during the later part of 1987 the evidence was not clear with respect to the exact time that the rental payments were received by the Debtors, the precise amount of said rental payments, or whether the Federal Land Bank in fact holds an assignment of rents over the property for which rental payments were received by the Debtor. An examination of Exhibit P-2 at paragraph 11 contains such an assignment, but also contains an option in favor of Land Bank to demand an assignment of "rents . . . derived from . . . the within described real property." Since the assignment is neither

absolute nor unconditional, the case relied upon by Land Bank is distinguishable. 77 B.R. 981 at 983. Accordingly, the request by Land Bank for recovery of these sums is denied.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the Motion for Relief from Stay filed by Federal Land Bank of Columbia is denied and Debtors are ORDERED to make adequate protection payments as set forth within the terms of this Order.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 27th day of April, 1988.